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OCTOBER TERM, 1974

No. 74-638

TEXACO INC.,

Petitioner,

versus

STATE OF LOUISIANA, ET AL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

REPLY BRIEF OF TEXACO INC.

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PRELIMINARY STATEMENT

In keeping with Rule 24.4 of the Supreme Court Rules, this brief is a reply only to those arguments which were first raised in the brief of the State of Louisiana and Gulf Oil Corporation, opposing the petition of Texaco Inc. for a writ of certiorari, and is not to be considered as limiting in any way the arguments advanced in support of that petition.

The new points urged by Respondents are directed mainly at the alternative federal question of the petition. They contend that:

(a) The *Bonelli* case is not here applicable and the ordinary high water line of Six Mile Lake should be located under State law at the original high water line of the water body.

(b) In any event the present high water line of the water body was established by the Louisiana Supreme Court on the basis of evidence in the record and no further question remains for review.

So that these questions may be considered in their proper perspective, we remind the Court that they will not be reached at all if, under the primary federal question presented, it is decided that Louisiana relinquished the banks of Six Mile Lake (being the area between ordinary high and ordinary low water) to the riparian owners under Civil Code Articles 455, 509 and 510. In that event the entire area in dispute extending to the ordinary low water line of Six Mile Lake would belong to defendants.

I.

APPLICATION OF THE BONELLI CASE

If the *Bonelli* case does not apply here, then State law governs and the State's title to the bed of Six Mile Lake would extend to the ordinary high water line existing at the time of statehood. *State v. Jefferson Island Salt Mining Co., Inc.*, 183 La. 304, 163 So. 145 (1935). By contending that Bonelli is inapplicable, Respondents are in effect

urging that the original and not the present ordinary high water line of the water body governs in the present case.

In *Bonelli* the land in dispute was above the ordinary high water line of the Colorado River at the time of statehood but became submerged when the river moved eastward eroding its shore and later surfaced as a result of the artificial rechanneling of the water body. Applying principles of the federal common law, the Court held that the State owned the land while submerged as part of the river bed, but that title thereto vested under federal law in the riparian owner as an accretive area when it became emergent.

Respondents contend that the *Bonelli* case applies only when an accretive area is formed above the original ordinary high water line of the water body and that state law governs where such area is formed below that line as in the present case. They also suggest that in *Bonelli* federal law was properly applied because the *Bonelli* property was included in a pre-state patent and under *Hughes v. Washington*, 389 U. S. 290, 88 S. Ct. 438 (1967) this rendered applicable the federal law of accretion.

The *Hughes* aspect of the case has no bearing here and may be eliminated from consideration at the outset. The Court in *Bonelli* stated that it was not clear whether the *Bonelli* property was actually riparian at the time of the patent[1] and since *Hughes* might not apply in that situa-

1 The land described in the above patent bordered the Colorado River, but the *Bonelli* property was in the eastern portion of that land and it was not clear whether the *Bonelli* parcel was actually riparian when the patent issued.

tion, the Court elected to and did base its decision on entirely different legal principles.

The precise and sole basis for applying federal law in the *Bonelli* case was that Arizona claimed title to the property in dispute by virtue of the federal equal footing doctrine and its claim was premised on a construction of that doctrine.[2] That being so, *Bonelli* and federal law apply in the present case for the identical reason. The *Bonelli* property, it will be observed, was not acquired under the equal footing doctrine at the time of statehood because it was then above the high water mark. However, the Court held that the State's title to a water body acquired under that doctrine mechanically changes with changes in the course or shore lines of the water body with the result that Arizona's equal footing title to the Colorado River covered the *Bonelli* land, under federal common law, when that area became part of the river bed by submergence. In the case at hand there is greater reason for applying the principles of *Bonelli* as the area in dispute was acquired originally by Louisiana at the moment of statehood under the equal footing doctrine.

It is contended by Respondents that areas below the original high water line of equal footing water bodies which later become accretive areas by emergence are governed by state law because the *Bonelli* court expressly recognized that "it is left to the States to determine the rights of riparian owners in the beds of navigable streams which under federal law belong to the States." But that principle would have been equally applicable in *Bonelli*

2 Arizona also claimed under the Submerged Lands Act, but the Court held that this act did not extend to the States any interest beyond that afforded by the equal footing doctrine.

because the *Bonelli* property once it was submerged, became part of Arizona's equal footing title by operation of federal common law. The principle was held not applicable in *Bonelli* because the issue, as found by the Court, was "not what rights the State has accorded private owners in lands which the State holds as sovereign; but rather how far the State's sovereign right extends under the equal footing doctrine — whether the State retains title to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters." The *Bonelli* Court thus made it clear that the power of a State to determine the rights of riparian owners in the beds of navigable water bodies is limited to a direct disposition or relinquishment of the State's title in favor of the riparian owner,[3] and does not apply to a defeasance of the State's title by withdrawal of the waters from the shore or by other accretionary processes — a matter for determination under federal law.

Having narrowed the issues in *Bonelli* to the State's rights under the equal footing doctrine, the *Bonelli* Court held that the State had no claim to the emergent area and that it enured to the riparian owners under the federal common law of accretion because the State's rights under equal footing were to the bed "as a bed" for navigational and related purposes and did not extend to dry land cast up along the shore by the accretionary process which could no longer serve those purposes.

It is thus apparent that if the present high water line of Six Mile Lake is now below the original high water line of

3 An example of this is Louisiana's relinquishment to riparian owners of the banks of navigable streams under Civil Code Articles 455, 509 and 510.

that water body, the area emerging between those elevations is an accretionary area the title to which must be determined by the federal common law under the principles of the *Bonelli* case.

II.

LOCATION OF THE PRESENT HIGH WATER LINE OF SIX MILE LAKE.

The area here in dispute is along the south shore of Six Mile Lake. With that in mind, the Court need only read the decretal portion of the Louisiana Supreme Court's opinion on rehearing to see that the outer boundary of State ownership and of the area in dispute was fixed at the original and not the present high water line of the water body. This is how the elevation involved was established by the Court:

> "Commencing at a point on the present shore line of Six Mile Lake at its intersection with the boundary line between Sections 66 and 67, Township 15 South, Range 11 East, which point is also the Southwest corner of State Lease No. 2940, thence (for the Eastern boundary of the area herein described) running North 4700 feet to the south boundary line of State Lease No. 1392, thence West 9900 feet along the South line of said State Lease No. 1392 to a point for a corner, thence South to the *original South shore line* of Six Mile Lake, and thence in an Easterly, Southeasterly and Northeasterly direction following the

meanders of the *original South shore line* of said Six Mile Lake to the Eastern boundary of the area herein described; being all of the area between the East and West boundaries thereof hereinabove set forth and extending from the North boundary thereof South to the *original shore line* of Six Mile Lake, said *original shore line* herein referred to being as shown on plat on file in State Land Office and attached to State Lease 2963 to Gulf Oil Corporation, dated April 18, 1956, duly recorded in the Conveyance Records of St. Mary Parish, Louisiana." (Emphasis ours).

The foregoing description is taken verbatim from numerical paragraph 6 of the Complaint where Respondents set out and describe the area in dispute in this case. In their brief herein (pp. 4, 5) Respondents expressly acknowledge that "as a result of the pleadings" the area in dispute is defined "as that portion of the bed of Grand Lake-Six Mile Lake — between the high water mark of Grand Lake-Six Mile Lake *as it existed in 1812* and its present low water mark".

The fact that the Louisiana Supreme Court stated in its opinion on rehearing that "the instant case involves a bank area and alluvion below the present ordinary high water mark of the lake" (Appendix "D" 1, p. 193, Texaco's petition) does not negate the fact that the Court established the outer limits of State ownership at the original high water line of the water body.

The present ordinary high water line of Six Mile Lake did not become an issue in this case until the *Bonelli* deci-

sion was handed down several years after trial of the case, hence no evidence was offered to establish that elevation. Daily gauge records reflecting high and low water stages over a period of years extending to early 1963 and land surface elevations of the area in dispute with relation to the Mean Sea Level Datum (all offered in evidence to determine the ordinary low water line) are not pertinent from either a legal or factual standpoint. As shown at pp. 28 and 29 of Texaco's petition herein, daily water stages are competent evidence only for water bodies having high water elevations determined by the course of the tides and not for water bodies like Six Mile Lake which have no absolute ascertainable level because of variations of flow from a number of causes. Moreover, these gauge records in any event would not establish the high water line either at the time of trial or at the present time because of changed conditions since the gauge recordings were discontinued in early 1963. Later in the same year and *some four years prior to trial* an artificial structure installed at Turnball Island by the Army Engineers for water control purposes allowed only optimum amounts of water from the Mississippi and Red Rivers to enter the Atchafalaya and undoubtedly had a marked effect on the present high water elevation of Six Mile Lake particularly when considered with channel and levee work in the basin. This is exactly the same situation created by the Hoover Dam with respect to the Colorado River. It has been judicially recognized that operation of that dam lowered the high water elevation of the river and that state ownership of its bed was limited accordingly. *United States v. Claridge*, 416 F. 2d 933 (1969), cert. denied, 397 U. S. 961, 90 S. Ct. 994; *Bonelli Cattle Company v. Arizona*, 94 S.Ct. 517, 38 L. Ed. 2d 526 (1973).

At page 14 of their brief herein Respondents assert that there is no basis for a remand of this case to determine the effect on the high water elevation of artificial installations placed in operation subsequent to the *filing and trial of this case.* That statement does not reflect the true situation. The water control installation at Turnbull Island had been in operation some *four years before this case came to trial* and has since been in operation. It goes without saying that Petitioners have not had their day in Court on this question since the present high water line at Six Mile Lake was not at issue prior to *Bonelli* and if evidence on that question had been offered, it would have clearly been excluded. If the alternative federal question is reached in this case, the ends of justice clearly require a remand of the case for proper establishment of the limits of State ownership.

III.

THE DARBY MAP SUBMITTED BY RESPONDENTS IN CONNECTION WITH THE PRIMARY FEDERAL QUESTION PRESENTED.

Appendix II at page 41 of Respondents' brief is a small segment of a map prepared by William Darby shortly after statehood. This map is obviously presented for the purpose of indicating similarity between Grand Lake-Six Mile Lake and Lake Calcasieu and Grand Lake (in Cameron Parish), water bodies involved in prior decisions of the Louisiana Supreme Court on which Respondents rely to support the decision of that Court in the present case, to-wit: *State v. Erwin*, 173 La. 507, 138 So. 84 (1931); *Miami Corp. v. State*, 186 La. 784, 173 So. 315

(1937); *Doiron v. O'Bryan*, 218 La. 1069, 51 So. 2d 628 (1951),[4] and also to suggest that the main flow of the waters of the Atchafalaya River System does not enter Grand Lake-Six Mile Lake, but is diverted to the east of that water body.

The Darby map shows a stream designated as "Atchafalaya River" flowing to the east of Grand Lake-Six Mile Lake, and entering that water body only at its extreme southeastern end. This stream is only one of the branches of the Atchafalaya River and is shown as "Grand River" on the official township plats of the area. Appendix IV, p. 16a of Texaco's petition herein.

The time-worn contention that the waters of the Atchafalaya River System were diverted in that manner was previously considered and rejected by the Louisiana Courts. In the *Amerada* case the Court, after considering the Darby map and other ancient maps and writings, found "that since 1812 there has been no noticeable diversion of the Atchafalaya River to Bayou Nimrod, Chicot Pass or the Arm of Grand Lake" — all tributaries flowing into the head of Grand Lake-Six Mile Lake itself. In *State v. Cockrell*, 162 So. 2d 361, cert. denied 164 So. 2d 350 (1964), the Court after reviewing the same evidence found that the main flow of the Atchafalaya River System is through Grand Lake-Six Mile Lake, rejecting the contention that the waters of the Atchafalaya River were

4 Even if comparison could be drawn between these water bodies and Grand Lake-Six Mile Lake, which we deny, the cited cases do not lend support to the decision in the present case because *Miami* and *Doiron* did not involve the issue of water body classification, and *Erwin* was supplanted by *Amerada Petroleum Corporation v. State Mineral Board*, 203 La. 473, 14 So. 2d 61 (1943) and its progeny, all as fully set forth at pp. 24, 25 and 26 of Texaco's petition herein.

diverted to the east of that water body. A like finding was made in the present case. Texaco's petition, Appendix "A", pp. 25-30, Appendix "C", pp. 156, 157.

A view of this enormous and dynamic water system is reflected by the segment of the Official State Map which is annexed as Appendix I, p. 1a of Texaco's petition herein. The water ways and drainage pattern of the basin as of 1812 are not materially different from what appears on that map. The findings of fact in the present case, which were not disturbed by the Louisiana Supreme Court on rehearing, were that in 1812, and since, a very substantial portion of the waters of the Atchafalaya River System flowed through Grand Lake-Six Mile Lake into the Gulf of Mexico. Darby himself testified to the great quantity and force of the waters of the Atchafalaya River through entries in his journal published in 1817. At one place he remarked, from first hand observation, that "the rapidity of the current of the Atchafalaya and the quantity drawn by its efflux from the Mississippi is almost inconceivable."

The official State map, when considered in the light of the record, leaves no valid basis for comparison between Grand Lake-Six Mile Lake and the eliptical water bodies along the coast of Louisiana, relied upon by Respondents, as to configuration, water shed and dynamics of the water systems involved.

CONCLUSION

For the foregoing reasons and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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